

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

**IN RE: VALSARTAN PRODUCTS
LIABILITY LITIGATION**

CIVIL ACTION NUMBER:

19-md-02875-RBK-KMW

**MOTION FOR RECONSIDERATION
VIA REMOTE ZOOM
VIDEOCONFERENCE**

Mitchell H. Cohen Building & U.S. Courthouse
4th & Cooper Streets
Camden, New Jersey 08101
June 23, 2021
Commencing at 1:00 P.M.

B E F O R E:

**SPECIAL MASTER THE HONORABLE
THOMAS I. VANASKIE**

A P P E A R A N C E S:

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ALSO PRESENT:

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produced by computer-aided transcription.

1 (PROCEEDINGS held remotely via Zoom videoconference before
2 Special Master The Honorable Thomas I. Vanaskie at 1:28 P.M.)

3 JUDGE VANASKIE: All right. I'll call this proceeding
4 to order. Apologies for the delay in starting this afternoon
5 but our court reporter was in court and had to complete that
6 proceeding, obviously, before beginning this one. But we're
7 now ready to proceed.

8 It is a motion, I take it, to reconsider; although
9 it's presented pursuant to provisions of the confidentiality
10 order in this matter, Document Number 139, Paragraph 21 of that
11 order.

12 Mr. Stanoch, will you be arguing on behalf of the
13 plaintiffs?

14 MR. STANOCH: Yes, Your Honor. Good afternoon.

15 JUDGE VANASKIE: Good afternoon.

16 So the first question I have for you, Mr. Stanoch,
17 maybe the only question but certainly the first question I have
18 is, should I be looking at this under the standard of review
19 applicable to reconsideration motions?

20 MR. STANOCH: Excellent question, Your Honor, and I
21 believe the answer emphatically is no.

22 As Your Honor intimated already, we did exactly what
23 the discovery confidentiality order, the order that these
24 defendants wanted and that Judge Kugler entered, requires. We
25 first brought the intention informally to Your Honor and then

1 Paragraph 21 of the discovery confidentiality order clearly
2 provides that either party may petition by formal motion
3 thereafter, and that is what we did.

4 JUDGE VANASKIE: All right.

5 MR. STANOCH: Your Honor will recall, we never briefed
6 this issue in the CMC letter, we weren't asked to brief it in
7 the CMC letter, I believe we weren't even able to discuss the
8 actual contents of the emails at issue on the record at the
9 last CMC, so we disagree, obviously, that the reconsideration
10 standard applies.

11 JUDGE VANASKIE: All right. Ms. Lockard, are you
12 arguing for Teva on this matter?

13 MS. LOCKARD: Yes, Your Honor, I'll be arguing for
14 Teva.

15 JUDGE VANASKIE: Do you want to respond to that
16 question, and then we will go back to Mr. Stanoch.

17 MS. LOCKARD: Yes, absolutely, Judge.

18 You know, first and foremost, the motion itself is
19 titled Plaintiffs' Motion and Memorandum of Law in support of
20 their Motion for Reconsideration of the Court's Guidance on
21 Privilege Log. And so it is plainly entitled as a Motion for
22 Reconsideration.

23 The protective order itself was not -- did not state
24 under what standard these motions should be brought. The
25 protective order itself is not just something the defendants

1 requested or drafted out of whole cloth. That was a joint
2 proposal to the Court and, in fact, it was based off of, and
3 Judge Kugler -- or Judge Schneider, rather, required that it be
4 based off of the order that these plaintiffs' counsel used in
5 the *Benicar* litigation. So I want to dispel any notion that
6 this was our language or our proposal.

7 That said, I think it's fair, in the protective order,
8 that motions may be filed to reconsider determinations made by
9 the Court. You know, at the time when the protective order was
10 entered, we obviously didn't have a Special Master and we had
11 the Magistrate Judge Schneider who was making these rulings.
12 And so I do believe, you know, if this had been brought last
13 year before Judge Schneider, you know, it certainly would have
14 been treated as a Motion for Reconsideration of the
15 Magistrate's ruling.

16 So the fact that we have you now as a Special Master,
17 and we're grateful that you were inclined to step in and help,
18 you know, I don't think that changes anything. I don't think
19 the protective order allows just a, you know, de novo review of
20 the Special Master or Magistrate's rulings on discovery issues.
21 That is not an efficient management of the case. I don't think
22 that that was ever intended by Judge Kugler or anyone in this
23 case. You were entrusted and brought in and no one, to my
24 knowledge, objected to have you review these discovery issues
25 and, in your wisdom and experience, make the right decisions.

1 If a party disagrees with it, then certainly I think the
2 protective order allows a party to bring a Motion for
3 Reconsideration, but I don't believe that it allows us to
4 re-litigate and rehash a decision that we disagree with. I
5 don't think that would be in the interest of the litigation.

6 So not only is it labeled Reconsideration, it is, in
7 fact, a motion asking Your Honor to reconsider your prior
8 ruling. So that's why we do believe the standard should apply.
9 If it doesn't, I see nothing else in plaintiffs' papers that
10 some other standard should apply here.

11 JUDGE VANASKIE: All right. Thank you, very much.

12 Mr. Stanoch, now, let's assume that I apply a de novo
13 standard of review here. Why aren't these communications that
14 were sent to Rachel Gallagher protected?

15 MR. STANOCH: Thank you, Your Honor.

16 Teva does not dispute in their papers that they have
17 the burden of establishing the privilege, and I think we can
18 all agree to that; it's their burden under the law here to
19 establish that. And while they sprinkle phrases about
20 reasonably anticipated litigation throughout their filing, Your
21 Honor, they only specifically claim attorney-client privilege
22 as to these three particular email communications. So that's
23 our focus, Your Honor.

24 And if we look at these three communications, Your
25 Honor, and I know you have looked at them, there's no legal

1 advice being rendered, there's no legal advice being requested,
2 and it's purely factual.

3 Stepping back, also, Your Honor, in terms of Teva's
4 burden, they make some broad statements about that this is
5 about legal and regulatory responses and issues. There's no
6 reference to that in these three emails. They don't even tell
7 Your Honor in their papers who all these people are in these
8 emails.

9 Yes, Ms. Gallagher, we know, is an inhouse attorney.
10 Mr. Nassall is in procurement. None of these other people are
11 lawyers or dealing with, quote, legal or anticipated litigation
12 or regulatory response issues. They haven't provided
13 declarations, they haven't provided affidavits or, frankly, any
14 other explanation besides cursory lawyer argument about how
15 this relates to the rendering or request for legal advice.

16 And if we just simply look chronologically, Your
17 Honor, everything in Mr. Nassall's emails and Ms. Lyons'
18 emails, only three emails at issue in this chain, right,
19 everything -- everything is factual.

20 Mr. Nassall initially writes, in his first message of
21 September 17th at 6:07, it says, see below. Let me know if you
22 have any questions -- I'm paraphrasing, of course. Your Honor
23 can read it fully, it's short. It says, let me know if you
24 have any questions, factual questions, for ZHP. That's all he
25 says. He doesn't mention anticipated litigation, he doesn't

1 mention a request for legal advice, he doesn't mention pending
2 regulatory responses, none of which they show Mr. Nassall was
3 involved in. That's all he says.

4 Then Ms. Lyons writes back, again, factual questions,
5 basic questions that should be asked of the third party, facts.
6 She says, how many batches have the NDEA, which is a critical
7 issue in this case, Your Honor. How many of those batches have
8 NDEA, at what levels? What are they going to do about it? Are
9 they going to test other sartans? And then -- and there's --
10 again, there's nothing about rendering of legal advice or
11 asking legal advice or how this impacts any regulatory response
12 to any regulatory agency whatsoever.

13 And then Mr. Nassall replies again, he simply says,
14 here's what ZHP said and pastes the ZHP email.

15 At that point, Your Honor, I think it's interesting to
16 note, the email seam breaks, right? It looks as if Rachel
17 Gallagher forwarded the chain to Kristen Bauer, and all of the
18 people who were on the chain below, Mr. Nassall, Claire Lyons,
19 Corey Sawyer, Edith Koller-Dette, D-E-T-T-E, and the others,
20 they are all removed on Ms. Bauer's email message, if you
21 notice.

22 So the idea that Ms. Gallagher was potentially
23 rendering legal advice to Mr. Nassall or Ms. Lyons, it's belied
24 by the facts of the email itself. She never responded, she
25 never asked Ms. Bauer to respond to those people. In fact, Ms.

1 Bauer then copied a whole new slew of people talking about a
2 completely different issue regarding Russia.

3 So we think, Your Honor, that on its face, these
4 emails are not privileged, it's about factual contents, there's
5 no requests or provision of legal advice, and they're simply
6 facts and that there's nothing there for these particular
7 emails which warrant redaction.

8 JUDGE VANASKIE: Mr. Stanoch, could you not infer from
9 the Jens, maybe it's Jens, Nassall September 17, 2018, email at
10 7:06 when he says any specific questions we should ask, as a
11 request towards -- a request directed to Rachel Gallagher for
12 her input, her advice, from a legal standpoint, in terms of
13 what questions to ask?

14 MR. STANOCH: I don't think so, Your Honor, for -- I
15 say that for a couple reasons. Number one is, Ms. Gallagher
16 never responded. So to the extent we can infer this, the fact
17 that she never responded herself in this chain suggests she
18 had -- she was not being -- she did not think she was being
19 asked to provide it nor did she volunteer any legal advice.

20 Also, Mr. Nassall, as a procurement person, is asking
21 his colleagues specific questions to ask ZHP. He's not saying,
22 how will this affect our regulatory responses or our grand
23 litigation strategy globally throughout the world, which is
24 what Teva says in their brief these emails are privileged for.
25 None of that's there. It's simply the simple matter of fact

1 nonprivileged procurement to the other procurement and quality
2 people at Teva where he's saying, just found out about this,
3 what should we ask ZHP.

4 JUDGE VANASKIE: All right. Thank you.

5 Ms. Lockard?

6 MS. LOCKARD: Yes, Your Honor.

7 So, you know, as the law makes clear, the fact that
8 factual information is being conveyed does not take the
9 communication outside of the realm of the privilege. It also
10 does not require that there be an express request in the
11 communication for, quote, legal advice or discussing
12 specifically litigation matters. And, you know, as you have
13 referenced, the tone and the tenor and the context of these
14 communications is all equally as important as what it actually
15 said in the body of the email.

16 So from our perspective, looking at this as a whole,
17 it is very obvious the reason that Ms. Gallagher was copied on
18 these emails -- or, rather, not copied but she was a direct
19 recipient. At this point in time there was an ongoing
20 regulatory recall and investigation, there was litigation that
21 was brewing, plaintiff lawyer advertising had already started
22 by this point, and, you know, very candidly, there were --
23 there were -- there were committees and activities going on at
24 Teva during this time in response to this issue. It was
25 obvious that litigation was to follow and that legal counsel

1 was involved. And Ms. Gallagher was and is, to this day, still
2 very much involved in this litigation as the lead lawyer and
3 who's assisting Teva from the inhouse side of this. She was
4 involved in many of the strategic decisions with respect to,
5 you know, marshalling the evidence, the information that was
6 coming in, you know, responding to regulatory inquiries and
7 things of that nature.

8 So, you know, plaintiffs' counsel also says, you know,
9 well, Ms. Gallagher never responded to this request. We don't
10 know that. There were meetings, there were phone calls
11 happening daily on this issue during this time period. There
12 were other emails that are privileged that came from Ms.
13 Gallagher. Ms. Gallagher, obviously, as counsel, she's not a
14 custodian, we don't know all of the emails she sent on this.
15 So I don't think you could conclude from this email chain that
16 she never responded or answered Mr. Nassall's question about
17 how to respond. So I think we need to look at what we have
18 here on the face of it.

19 You know, the other issue was, Mr. Stanoch takes issue
20 that, you know, there's a missing email somewhere in the chain
21 apparently from Ms. Gallagher. It is obvious Ms. Gallagher
22 forwarded this information on to Kristen Bauer, the other
23 inhouse counsel. Plaintiffs don't take issue with us redacting
24 or clawing back Ms. Bauer's email. And we haven't attempted to
25 clawback or redact anything following Ms. Bauer's email in the

1 chronological time period.

2 So the fact that Ms. Bauer took the email and sent it
3 to a new group of people, I don't know what relevance that has
4 at this point other than, you know, those emails themselves
5 we're not attempting to clawback.

6 But if you look at the information, the factual
7 information itself, I mean, plaintiffs' counsel says they need
8 the information for purposes of a defense, but the actual
9 factual information has been produced in nonprivileged
10 documents, the actual email that Mr. Nassall cut and paste
11 verbatim into this email stream was produced separately in
12 unredacted form. So plaintiffs' counsel has had that since
13 late last year, you know, they're able to use that, ask Mr.
14 Nassall about it, so I don't see what that adds to their
15 defense or why it is they would need the privileged documents.

16 So I think Your Honor made the right decision. You've
17 obviously reviewed these carefully, taking into account the law
18 that we've cited which requires to look past the words and the
19 express language in the email but to focus really on the
20 context and the tone and the tenor, and what was happening
21 during this time period I think is important and, for us, makes
22 these easily privileged documents that should remain so.

23 JUDGE VANASKIE: All right. Let me ask you a question
24 now, Ms. Lockard.

25 What is there in the September 17, 2018, email at

1 10:33 from Claire Lyons to Mr. Nassall and others, including
2 Rachel Gallagher, that would suggest that Rachel Gallagher was
3 being approached or the email was -- she was copied on the
4 email for the purposes of providing legal advice? If you'll
5 look at that email. I'm having trouble on that one.

6 MS. LOCKARD: Sure. And so this email itself, it does
7 include questions that Ms. Lyons is seeking to answer. Ms.
8 Lyons was heavily involved in communicating with FDA and our
9 regulatory department at Teva to determine the extent of the
10 investigation, what needed to be investigated, what needed to
11 be recorded, and she was including Ms. Gallagher on this
12 because this is information that Ms. Gallagher needs -- factual
13 information that Ms. Gallagher needed to gather as well in
14 order to be able to properly advise the company with respect to
15 its regulatory obligations, its retention issues, you know, its
16 investigation. And so, you know, just even the information
17 that a client determines is important to be conveyed to the
18 lawyer, that in and of itself is protected. You know, what a
19 client is thinking is important enough to be conveyed to the
20 lawyer so that the lawyer can render decisions, render advice,
21 you know, that in and of itself should be protected, Your
22 Honor.

23 So if I have a client who sends me factual
24 information, you know, what they send to me, when they send it
25 to me, how they send it to me, that should all be protected.

1 You know, otherwise, my -- you know, my file that included
2 information that the client sent me forwarding information,
3 forwarding documents, that would all fall outside of the
4 privilege and we know that's not the case.

5 So we think it's very important to see that this
6 potentially, you know, could erode the attorney-client
7 privilege if we are saying that, you know, information that is
8 just factual or that's informational gathering in nature is
9 somehow not protected. What is sent to the lawyer, what the
10 lawyer has -- I mean, this reflects what the lawyer has said is
11 important for her to understand and to know. So, I mean, I
12 think that there is no question that when you send information
13 of this nature to the lawyer, you know, it should be protected.

14 There are similar emails throughout the hundreds of
15 thousands of documents that lawyers were not involved, not --
16 not included on the email discussions, those have all been
17 produced. We don't have an issue with that. But when you
18 bring in a lawyer, she is part of the information gathering,
19 she's helping to instruct what needs to be gathered or what
20 needs to be rendered important, what's important, what needs to
21 be reported, you know, all of this falls into that entire
22 process and the process itself is also privileged as well as
23 the words on the paper.

24 THE COURT: All right. Mr. Stanoch?

25 MR. STANOCH: Thank you.

1 JUDGE VANASKIE: I have a question for Mr. Stanoch.

2 One of the points made in Teva's responsive brief is
3 that, for example, the communication from ZHP, I think it's
4 from ZHP, of the fact of the contamination has been produced,
5 the one that Mr. Nassall forwarded on to others, so you have
6 that information, correct?

7 MR. STANOCH: Yes, Your Honor, we do have a separate
8 email from ZHP to Mr. Nassall, that's correct.

9 JUDGE VANASKIE: Okay.

10 MR. STANOCH: I would say on that, in that context,
11 Your Honor, if I may, that does not -- whether a different
12 document might be privileged is not a good assessment of
13 whether the particular emails we're looking at here are
14 privileged. Who within Teva knew what, factually, knew what,
15 when, from whom, by whom, those are facts, not privileged
16 information, that we're entitled to know.

17 If Mr. Nassall forwarded the fact of the contents
18 verbatim of a ZHP, third-party, message to particular
19 nonlawyers, such as Ms. Lyons and a number of other procurement
20 and other folks at Teva, we're entitled to know that they knew
21 that because this is -- there's a lot of claims in this case,
22 Your Honor, about who within Teva knew what, when, and about
23 the NDEA. And it's more than just Jens Nassall who got an
24 email from ZHP on a certain day. We're entitled to know that
25 that same information was pasted in the emails to Ms. Lyons, to

1 Mr. Fluke in procurement, and to a number of others.

2 JUDGE VANASKIE: Okay. Anything else, Ms. Lockard?

3 MS. LOCKARD: Well, Your Honor, you know, Claire Lyons
4 has been deposed, Corey -- or Jens Nassall is being deposed,
5 we're not trying to prevent any information about when these
6 individuals knew certain factual events. You know, I think a
7 review of the documents we've produced carefully lays that out
8 without getting into the privileged materials. The depositions
9 themselves, counsel's entitled to ask Mr. Nassall when he knew
10 of the facts, you know, present; when he -- you know, who did
11 he report this to, who else at Teva knew this. I mean, I think
12 that's all fair game in a deposition. There will be no
13 prevention of getting into that type of information, but they
14 can't bring up a privileged document and put that in his face
15 in a deposition in order to establish it.

16 You know, if we need -- there was reference to an
17 affidavit. We're officers of the court. You know, this is an
18 expedited ruling. We didn't provide affidavits but we're happy
19 to do so if that would assist the Court. I don't think it's
20 necessary but if there's any unresolved question about the
21 intent behind these or Ms. Gallagher's communications, we're
22 happy to provide an affidavit to fill in any gaps.

23 JUDGE VANASKIE: All right. Mr. Stanoch, anything
24 else?

25 MR. STANOCH: Yes, Your Honor, just very briefly in

1 response to Ms. Lockard's opening position, because I just
2 jumped to the ZHP email that was pasted by Mr. Nassall.

3 A lot of what Ms. Lockard said in her initial
4 statement to the Court, none of this is in the four corners of
5 the documents, Your Honor. Nothing here is about marshalling
6 information for regulatory global responses and pending
7 litigation. She mentions daily phone calls and references to
8 various regulatory responses, none of that's here; or
9 instructions or seeking instructions from Ms. Gallagher,
10 there's no instructions sought here. No one said, Ms.
11 Gallagher, what do you think we should ask ZHP. In fact,
12 Claire Lyons didn't even say, what do all of you think we
13 should ask ZHP. She says, here's the questions we should ask
14 ZHP. That's it. So whether there is some atmospherics about
15 what's going on potentially in the world, we have to focus on
16 the context of these emails and this document and the assertion
17 of privilege as to these documents; and these documents, these
18 emails, don't satisfy the privilege standard.

19 JUDGE VANASKIE: All right. Thank you, very much.

20 I'm going to give you a ruling now on the Motion for
21 Reconsideration.

22 First, I think it is appropriate to apply a de novo
23 standard of review here and not the deferential standard that
24 applies in reconsideration motions.

25 The initial decision I made was based upon what had

1 been presented to me at the time, which wasn't necessarily
2 complete and wasn't fully briefed, but applying a de novo
3 standard, I believe that the email, initial email from Mr.
4 Nassall that copied Ms. Gallagher, implicit in the fact that he
5 copied her on that email is getting her input from a legal
6 standpoint, her legal advice in terms of what should be done
7 with respect to this matter. This isn't, in my judgment, a
8 situation where business communications are funneled to an
9 attorney -- I know that's a term that Professor Paul Rice has
10 used in this context -- funneled to counsel in order to
11 fabricate this protection. This is a reaction to information
12 that is significant and it would be appropriate to copy counsel
13 on that for the purpose of seeking counsel's legal advice with
14 respect to this revelation of the contamination of the product.
15 So that initial email I believe is protected by the
16 attorney-client privilege.

17 The next email in the chain is the one from Claire
18 Lyons to Mr. Nassall and others, including Rachel Gallagher,
19 where Claire Lyons asks several questions. Again, I think that
20 Ms. Gallagher was included for purposes of getting her reaction
21 to this list of questions from a legal perspective. Is it
22 complete? Are there other questions that needed to be asked?
23 Is this the -- what should we do with this information? I
24 think Ms. Gallagher has been included in this particular email
25 for purposes of securing advice or input of a legal nature.

1 And the final email, the one from Mr. Nassall on
2 September 18th, I think falls within the same category. Ms.
3 Gallagher has been included in that email chain. I think the
4 context of all of this is her role as part of this team and I
5 think you can infer as part of this control group, for purposes
6 of the attorney-client privilege, was to provide legal advice.

7 And so I believe that all three emails were
8 appropriately claimed to be covered by the attorney-client
9 privilege. Teva is entitled to clawback these three emails and
10 you should follow the provisions of the protective order with
11 respect to the mechanics of the clawback; for example, the need
12 to destroy copies of the emails.

13 So I am denying the motion. It's labeled as a Motion
14 for Reconsideration. I've applied a de novo standard of review
15 but I believe the motion should be denied. All right.

16 Anything else?

17 MR. STANOCH: No, Your Honor.

18 MS. LOCKARD: No, Your Honor.

19 JUDGE VANASKIE: All right. Thank you all very
20 much.

21 MR. STANOCH: Thank you.

22 MS. LOCKARD: Thank you, Judge.

23 JUDGE VANASKIE: See you tomorrow.

24 MS. LOCKARD: Friday.

25 JUDGE VANASKIE: Friday.

1 MS. LOCKARD: See you Friday.

2 (The proceedings concluded at 1:55 p.m.)

3 - - - - -

4 I certify that the foregoing is a correct transcript
5 from the record of proceedings in the above-entitled matter.

6

7 /S/ Camille Pedano, CCR, RMR, CRR, CRC, RPR
8 Court Reporter/Transcriber

9 June 24, 2021
10 Date

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/	11:10	B	6:16	Corey [2] - 7:19, 15:4
/S [1] - 19:7	adds [1] - 11:14	based [3] - 4:2, 4:4, 16:25	cited [1] - 11:18	corners [1] - 16:4
0	advertising [1] - 9:21	basic [1] - 7:5	CIVIL [1] - 1:3	correct [3] - 14:6, 14:8, 19:4
08101 [1] - 1:8	advice [17] - 6:1, 6:15, 7:1, 7:10, 7:11, 7:23, 8:5, 8:12, 8:19, 9:11, 12:4, 12:20, 17:6, 17:13, 17:25, 18:6	batches [2] - 7:6, 7:7	claim [1] - 5:21	counsel [9] - 4:4, 9:25, 10:8, 10:13, 10:23, 11:7, 11:12, 17:10, 17:12
1	advise [1] - 12:14	Bauer [5] - 7:17, 7:25, 8:1, 10:22, 11:2	claimed [1] - 18:8	counsel's [2] - 15:9, 17:13
10:33 [1] - 12:1 139 [1] - 2:10 17 [2] - 8:9, 11:25 17th [1] - 6:21 18th [1] - 18:2 19-md-02875-RBK-KMW [1] - 1:4 1:00 [1] - 1:9 1:28 [1] - 2:2 1:55 [1] - 19:2	affect [1] - 8:22 affidavit [2] - 15:17, 15:22 affidavits [2] - 6:13, 15:18 afternoon [3] - 2:4, 2:14, 2:15 agency [1] - 7:12 agree [1] - 5:18 aided [1] - 1:25 allows [3] - 4:19, 5:2, 5:3	beginning [1] - 2:6 behalf [1] - 2:12 behind [1] - 15:21 belied [1] - 7:23 below [2] - 6:21, 7:18 Benicar [1] - 4:5 body [1] - 9:15 breaks [1] - 7:16 brewing [1] - 9:21 brief [3] - 3:6, 8:24, 14:2	claims [1] - 14:21 Claire [6] - 7:18, 12:1, 15:3, 16:12, 17:17, 17:19 clawback [4] - 10:25, 11:5, 18:9, 18:11 clawing [1] - 10:24 clear [1] - 9:7 clearly [1] - 3:1 Clerk [1] - 1:21 client [9] - 5:21, 12:17, 12:19, 12:23, 13:2, 13:6, 17:16, 18:6, 18:8	COURT [2] - 1:1, 13:24 Court's [1] - 3:20 Courthouse [1] - 1:7 COURTROOM [1] - 1:22
2	ALSO [1] - 1:20	briefed [2] - 3:5, 17:2	cloth [1] - 4:1	covered [1] - 18:8
2018 [2] - 8:9, 11:25 2021 [2] - 1:9, 19:9 21 [2] - 2:10, 3:1 23 [1] - 1:9 24 [1] - 19:9 2500 [1] - 1:17	answer [2] - 2:21, 12:7 answered [1] - 10:16 anticipated [3] - 5:20, 6:11, 6:25 apologies [1] - 2:4 applicable [1] - 2:19 applied [1] - 18:14 applies [2] - 3:10, 16:24 apply [4] - 5:8, 5:10, 5:12, 16:22 applying [1] - 17:2 approached [1] - 12:3	briefly [1] - 15:25 bring [3] - 5:2, 13:18, 15:14 broad [1] - 6:4 brought [4] - 2:25, 3:24, 4:12, 4:23 Building [1] - 1:7 burden [3] - 5:17, 5:18, 6:4 business [1] - 17:8 BY [2] - 1:13, 1:16	CMC [3] - 3:6, 3:7, 3:9 Cohen [1] - 1:7 colleagues [1] - 8:21 coming [1] - 10:6 Commencing [1] - 1:9 committees [1] - 9:23 communicating [1] - 12:8 communication [3] - 9:9, 9:11, 14:3 communications [6] - 5:13, 5:22, 5:24, 9:14, 15:21, 17:8	CRC [1] - 19:7 critical [1] - 7:6 CRR [1] - 19:7 cursory [1] - 6:14 custodian [1] - 10:14 cut [1] - 11:10
3	approach [1] - 12:3	Camden [1] - 1:8	company [1] - 12:14	D
30305 [1] - 1:17 3333 [1] - 1:17	appropriate [2] - 16:22, 17:12	Camille [2] - 1:23, 19:7	complete [3] - 2:5, 17:2, 17:22	daily [2] - 10:11, 16:7
4	appropriately [1] - 18:8	Camillepedano@gmail.com [1] - 1:23	completely [1] - 8:2	Date [1] - 19:9
4th [1] - 1:8	arguing [3] - 2:12, 3:12, 3:13	Camp [1] - 1:14	computer [1] - 1:25	DAVID [1] - 1:13
6	argument [1] - 6:14	candidly [1] - 9:22	computer-aided [1] - 1:25	DAVIS [1] - 1:16
609-774-1494 [1] - 1:24 6:07 [1] - 6:21	assertion [1] - 16:16	carefully [2] - 11:17, 15:7	conclude [1] - 10:15	de [5] - 4:19, 5:12, 16:22, 17:2, 18:14
7	assessment [1] - 14:12	case [5] - 4:21, 4:23, 7:7, 13:4, 14:21	concluded [1] - 19:2	dealing [1] - 6:11
701 [1] - 1:14 70130 [1] - 1:14 7:06 [1] - 8:10	assist [1] - 15:19	category [1] - 18:2	confidentiality [3] - 2:9, 2:23, 3:1	decision [3] - 5:4, 11:16, 16:25
A	assisting [1] - 10:3	CCR [1] - 19:7	contents [3] - 3:8, 8:4, 14:17	decisions [3] - 4:25, 10:4, 12:20
able [3] - 3:7, 11:13, 12:14 above-entitled [1] - 19:5 absolutely [1] - 3:17 account [1] - 11:17 Actavis [2] - 1:18, 1:19 ACTION [1] - 1:3 activities [1] - 9:23 actual [3] - 3:8, 11:8	assume [1] - 5:12 Atlanta [1] - 1:17 atmospherics [1] - 16:14 attempted [1] - 10:24 attempting [1] - 11:5 attorney [7] - 5:21, 6:9, 13:6, 17:9, 17:16, 18:6, 18:8 attorney-client [5] - 5:21, 13:6, 17:16, 18:6, 18:8	certain [2] - 14:24, 15:6 certainly [3] - 2:17, 4:13, 5:1 certify [1] - 19:4 chain [8] - 6:18, 7:17, 7:18, 8:17, 10:15, 10:20, 17:17, 18:3 changes [1] - 4:18 chronological [1] - 11:1 chronologically [1] -	context [6] - 9:13, 11:20, 14:10, 16:16, 17:10, 18:4 control [1] - 18:5 conveyed [3] - 9:8, 12:17, 12:19 Cooper [1] - 1:8 copied [6] - 8:1, 9:17, 9:18, 12:3, 17:4, 17:5 copies [1] - 18:12 copy [1] - 17:12	declarations [1] - 6:13 Defendants [1] - 1:18 defendants [2] - 2:24, 3:25 defense [2] - 11:8, 11:15 deferential [1] - 16:23 delay [1] - 2:4 denied [1] - 18:15 denying [1] - 18:13 department [1] - 12:9 deposed [2] - 15:4 deposition [2] - 15:12, 15:15 depositions [1] - 15:8 DEPUTY [1] - 1:22 destroy [1] - 18:12 determinations [1] -

<p>4:8 determine^[1] - 12:9 determines^[1] - 12:17 Dette^[1] - 7:19 DETTE^[1] - 7:19 different^[2] - 8:2, 14:11 direct^[1] - 9:18 directed^[1] - 8:11 disagree^[2] - 3:9, 5:4 disagrees^[1] - 5:1 discovery^[4] - 2:23, 3:1, 4:20, 4:24 discuss^[1] - 3:7 discussing^[1] - 9:11 discussions^[1] - 13:16 dispel^[1] - 4:5 dispute^[1] - 5:16 DISTRICT^[2] - 1:1, 1:1 document^[3] - 14:12, 15:14, 16:16 Document^[1] - 2:10 documents^[9] - 11:10, 11:15, 11:22, 13:3, 13:15, 15:7, 16:5, 16:17 done^[1] - 17:6 drafted^[1] - 4:1 during^[3] - 9:24, 10:11, 11:21</p>	<p>entire^[1] - 13:21 entitled^[7] - 3:21, 14:16, 14:20, 14:24, 15:9, 18:9, 19:5 entrusted^[1] - 4:23 equally^[1] - 9:14 erode^[1] - 13:6 ESQUIRE^[3] - 1:13, 1:16, 1:21 establish^[2] - 5:19, 15:15 establishing^[1] - 5:17 events^[1] - 15:6 evidence^[1] - 10:5 exactly^[1] - 2:22 example^[2] - 14:3, 18:11 excellent^[1] - 2:20 expedited^[1] - 15:18 experience^[1] - 4:25 explanation^[1] - 6:14 express^[2] - 9:10, 11:19 extent^[2] - 8:16, 12:9</p>	<p>foremost^[1] - 3:18 form^[1] - 11:12 formal^[1] - 3:2 forwarded^[4] - 7:17, 10:22, 14:5, 14:17 forwarding^[2] - 13:2, 13:3 four^[1] - 16:4 frankly^[1] - 6:13 Friday^[3] - 18:24, 18:25, 19:1 fully^[2] - 6:23, 17:2 funneled^[2] - 17:8, 17:10</p>	<p>2:2 HONORABLE^[1] - 1:10 hundreds^[1] - 13:14</p>	<p>issue^[11] - 3:6, 3:8, 6:18, 7:7, 8:2, 9:24, 10:11, 10:19, 10:23, 13:17 issues^[5] - 4:20, 4:24, 6:5, 6:12, 12:15 itself^[9] - 3:18, 3:23, 3:25, 7:24, 11:7, 12:6, 12:18, 12:21, 13:22</p>	
		<p>G</p>			
		<p>Gallagher^[25] - 5:14, 6:9, 7:17, 7:22, 8:11, 8:15, 9:17, 10:1, 10:9, 10:13, 10:21, 12:2, 12:11, 12:12, 12:13, 16:9, 16:11, 17:4, 17:18, 17:20, 17:24, 18:3 Gallagher's^[1] - 15:21 game^[1] - 15:12 gaps^[1] - 15:22 gather^[1] - 12:13 gathered^[1] - 13:19 gathering^[2] - 13:8, 13:18 Georgia^[1] - 1:17 global^[1] - 16:6 globally^[1] - 8:23 grand^[1] - 8:22 grateful^[1] - 4:17 GREENBERG^[1] - 1:16 group^[2] - 11:3, 18:5 Guidance^[1] - 3:20</p>			
		<p>H</p>			
		<p>happy^[2] - 15:18, 15:22 heavily^[1] - 12:8 held^[1] - 2:1 help^[1] - 4:17 helping^[1] - 13:19 herself^[1] - 8:17 Honor^[30] - 2:14, 2:20, 2:22, 2:25, 3:5, 3:13, 5:7, 5:15, 5:21, 5:23, 5:25, 6:3, 6:7, 6:17, 6:22, 7:7, 7:15, 8:3, 8:14, 9:6, 11:16, 12:22, 14:7, 14:11, 14:22, 15:3, 15:25, 16:5, 18:17, 18:18 Honorable^[2] - 1:21,</p>			
<p>E</p>					
<p>easily^[1] - 11:22 Edith^[1] - 7:19 efficient^[1] - 4:21 either^[1] - 3:2 email^[32] - 5:22, 7:14, 7:16, 7:20, 7:24, 8:9, 9:15, 10:15, 10:20, 10:24, 10:25, 11:2, 11:10, 11:11, 11:19, 11:25, 12:3, 12:4, 12:5, 12:6, 13:16, 14:8, 14:24, 16:2, 17:3, 17:5, 17:15, 17:17, 17:24, 18:1, 18:3 emails^[21] - 3:8, 6:6, 6:8, 6:17, 6:18, 8:4, 8:7, 8:24, 9:18, 10:12, 10:14, 11:4, 13:14, 14:13, 14:25, 16:16, 16:18, 18:7, 18:9, 18:12 emphatically^[1] - 2:21 entered^[2] - 2:24, 4:10</p>					
	<p>F</p>				
	<p>fabricate^[1] - 17:11 face^[3] - 8:3, 10:18, 15:14 fact^[12] - 4:2, 4:16, 5:7, 7:25, 8:16, 8:25, 9:7, 11:2, 14:4, 14:17, 16:11, 17:4 facts^[5] - 7:5, 7:24, 8:6, 14:15, 15:10 factual^[12] - 6:2, 6:19, 6:24, 7:4, 8:4, 9:8, 11:6, 11:9, 12:12, 12:23, 13:8, 15:6 factually^[1] - 14:14 fair^[2] - 4:7, 15:12 fall^[1] - 13:3 falls^[2] - 13:21, 18:2 FDA^[1] - 12:8 file^[1] - 13:1 filed^[1] - 4:8 filling^[1] - 5:20 fill^[1] - 15:22 final^[1] - 18:1 first^[6] - 2:16, 2:17, 2:25, 3:18, 6:20, 16:22 flake^[1] - 15:1 focus^[3] - 5:23, 11:19, 16:15 folks^[1] - 14:20 follow^[2] - 9:25, 18:10 following^[1] - 10:25 FOR^[2] - 1:1, 1:5 foregoing^[1] - 19:4</p>				
			<p>I</p>		
			<p>idea^[1] - 7:22 impacts^[1] - 7:11 implicit^[1] - 17:4 important^[8] - 9:14, 11:21, 12:17, 12:19, 13:5, 13:11, 13:20 IN^[1] - 1:4 Inc^[2] - 1:18, 1:19 inclined^[1] - 4:17 include^[1] - 12:7 included^[5] - 13:1, 13:16, 17:20, 17:24, 18:3 including^[3] - 12:1, 12:11, 17:18 individuals^[1] - 15:6 Industries^[1] - 1:18 infer^[3] - 8:8, 8:16, 18:5 informally^[1] - 2:25 information^[24] - 9:8, 10:5, 10:22, 11:6, 11:7, 11:8, 11:9, 12:12, 12:13, 12:16, 12:24, 13:2, 13:7, 13:12, 13:18, 14:6, 14:16, 14:25, 15:5, 15:13, 16:6, 17:11, 17:23 informational^[1] - 13:8 inhouse^[3] - 6:9, 10:3, 10:23 initial^[4] - 16:3, 16:25, 17:3, 17:15 input^[3] - 8:12, 17:5, 17:25 inquiries^[1] - 10:6 instruct^[1] - 13:19 instructions^[3] - 16:9, 16:10 intended^[1] - 4:22 intent^[1] - 15:21 intention^[1] - 2:25 interest^[1] - 5:5 interesting^[1] - 7:15 intimated^[1] - 2:22 investigated^[1] - 12:10 investigation^[3] - 9:20, 12:10, 12:16 involved^[6] - 7:3, 10:1, 10:2, 10:4, 12:8, 13:15</p>		
				<p>J</p>	
				<p>Jens^[4] - 8:9, 14:23, 15:4 JERSEY^[1] - 1:1 Jersey^[1] - 1:8 joint^[1] - 4:1 JUDGE^[17] - 2:3, 2:15, 3:4, 3:11, 3:15, 5:11, 8:8, 9:4, 11:23, 14:1, 14:9, 15:2, 15:23, 16:19, 18:19, 18:23, 18:25 Judge^[8] - 2:24, 3:17, 4:3, 4:11, 4:13, 4:22, 18:22 judgment^[1] - 17:7 Judicial^[1] - 1:21 jumped^[1] - 16:2 June^[2] - 1:9, 19:9</p>	
				<p>K</p>	
				<p>KANNER^[1] - 1:13 knowledge^[1] - 4:24 Koller^[1] - 7:19 Koller-Dette^[1] - 7:19 Kristen^[2] - 7:17, 10:22 Kugler^[4] - 1:21, 2:24, 4:3, 4:22</p>	
				<p>L</p>	
				<p>labeled^[2] - 5:6, 18:13 language^[2] - 4:6, 11:19 LARRY^[1] - 1:22 last^[3] - 3:9, 4:12, 11:13 late^[1] - 11:13 Law^[2] - 1:21, 3:19 law^[3] - 5:18, 9:7, 11:17 lawyer^[11] - 6:14, 9:21, 10:2, 12:18, 12:20, 13:9, 13:10, 13:13, 13:18 lawyers^[2] - 6:11, 13:15 lays^[1] - 15:7</p>	

<p>lead ^[1] - 10:2 legal ^[2] - 5:25, 6:1, 6:5, 6:11, 6:15, 7:1, 7:10, 7:11, 7:23, 8:5, 8:12, 8:19, 9:11, 9:25, 12:4, 17:5, 17:6, 17:13, 17:21, 17:25, 18:6 letter ^[2] - 3:6, 3:7 levels ^[1] - 7:8 LIABILITY ^[1] - 1:4 list ^[1] - 17:21 litigate ^[1] - 5:4 litigation ^[1] - 4:5, 5:5, 5:20, 6:11, 6:25, 8:23, 9:12, 9:20, 9:25, 10:2, 16:7 LITIGATION ^[1] - 1:4 LLC ^[2] - 1:13, 1:18 LLP ^[1] - 1:16 Lockard ^[5] - 3:11, 9:5, 11:24, 15:2, 16:3 LOCKARD ^[10] - 1:16, 3:13, 3:17, 9:6, 12:6, 15:3, 18:18, 18:22, 18:24, 19:1 Lockard's ^[1] - 16:1 Log ^[1] - 3:21 look ^[6] - 5:24, 6:16, 10:17, 11:6, 11:18, 12:5 looked ^[1] - 5:25 looking ^[3] - 2:18, 9:16, 14:13 looks ^[1] - 7:16 LORETTA ^[1] - 1:21 Louisiana ^[1] - 1:14 Ltd ^[1] - 1:18 Lyons ^[12] - 7:4, 7:18, 7:23, 12:1, 12:7, 12:8, 14:19, 14:25, 15:3, 16:12, 17:18, 17:19 Lyons' ^[1] - 6:17</p>	<p>matter ^[5] - 2:10, 3:12, 8:25, 17:7, 19:5 matters ^[1] - 9:12 mean ^[4] - 11:7, 13:10, 13:11, 15:11 mechanical ^[1] - 1:25 mechanics ^[1] - 18:11 meetings ^[1] - 10:10 Memorandum ^[1] - 3:19 mention ^[3] - 6:25, 7:1 mentions ^[1] - 16:7 message ^[3] - 6:20, 7:20, 14:18 might ^[1] - 14:12 missing ^[1] - 10:20 Mitchell ^[1] - 1:7 motion ^[6] - 2:8, 3:2, 3:18, 5:7, 18:13, 18:15 MOTION ^[1] - 1:5 Motion ^[7] - 3:19, 3:20, 3:21, 4:14, 5:2, 16:20, 18:13 motions ^[4] - 2:19, 3:24, 4:8, 16:24 MR ^[11] - 2:14, 2:20, 3:5, 5:15, 8:14, 13:25, 14:7, 14:10, 15:25, 18:17, 18:21 MS ^[9] - 3:13, 3:17, 9:6, 12:6, 15:3, 18:18, 18:22, 18:24, 19:1</p>	<p>7:25, 8:16, 8:17, 10:9, 10:16 new ^[2] - 8:1, 11:3 NEW ^[1] - 1:1 New ^[2] - 1:8, 1:14 next ^[1] - 17:17 none ^[5] - 6:10, 7:2, 8:25, 16:4, 16:8 nonlawyers ^[1] - 14:19 nonprivileged ^[2] - 9:1, 11:9 note ^[1] - 7:16 nothing ^[4] - 5:9, 7:10, 8:6, 16:5 notice ^[1] - 7:21 notion ^[1] - 4:5 novo ^[5] - 4:19, 5:12, 16:22, 17:2, 18:14 Number ^[1] - 2:10 NUMBER ^[1] - 1:3 number ^[3] - 8:15, 14:19, 15:1</p>	<p>6:22 part ^[3] - 13:18, 18:4, 18:5 particular ^[5] - 5:22, 8:6, 14:13, 14:18, 17:24 party ^[5] - 3:2, 5:1, 5:2, 7:5, 14:18 past ^[1] - 11:18 paste ^[1] - 11:10 pasted ^[2] - 14:25, 16:2 pastes ^[1] - 7:14 Paul ^[1] - 17:9 Pedano ^[2] - 1:23, 19:7 pending ^[2] - 7:1, 16:6 people ^[7] - 6:7, 6:10, 7:18, 7:25, 8:1, 9:2, 11:3 period ^[3] - 10:11, 11:1, 11:21 person ^[1] - 8:20 perspective ^[2] - 9:16, 17:21 petition ^[1] - 3:2 Pharma ^[1] - 1:19 Pharmaceutical ^[1] - 1:18 Pharmaceuticals ^[1] - 1:18 phone ^[2] - 10:10, 16:7 phrases ^[1] - 5:19 Piedmont ^[1] - 1:17 plainly ^[1] - 3:21 plaintiff ^[1] - 9:21 plaintiffs ^[2] - 2:13, 10:23 Plaintiffs ^[1] - 1:15 Plaintiffs' ^[1] - 3:19 plaintiffs' ^[5] - 4:4, 5:9, 10:8, 11:7, 11:12 point ^[4] - 7:15, 9:19, 9:22, 11:4 points ^[1] - 14:2 position ^[1] - 16:1 potentially ^[3] - 7:22, 13:6, 16:15 present ^[1] - 15:10 PRESENT ^[1] - 1:20 presented ^[2] - 2:9, 17:1 prevent ^[1] - 15:5 prevention ^[1] - 15:13 privilege ^[10] - 5:17, 5:21, 9:9, 13:4, 13:7, 16:17, 16:18, 17:16, 18:6, 18:9</p>	<p>Privilege ^[1] - 3:21 privileged ^[11] - 8:4, 8:24, 10:12, 11:15, 11:22, 13:22, 14:12, 14:14, 14:15, 15:8, 15:14 proceed ^[1] - 2:7 proceeding ^[2] - 2:3, 2:6 Proceedings ^[1] - 1:25 proceedings ^[2] - 19:2, 19:5 PROCEEDINGS ^[1] - 2:1 process ^[2] - 13:22 procurement ^[6] - 6:10, 8:20, 9:1, 14:19, 15:1 produced ^[6] - 1:25, 11:9, 11:11, 13:17, 14:4, 15:7 product ^[1] - 17:14 PRODUCTS ^[1] - 1:4 Professor ^[1] - 17:9 properly ^[1] - 12:14 proposal ^[2] - 4:2, 4:6 protected ^[7] - 5:14, 12:18, 12:21, 12:25, 13:9, 13:13, 17:15 protection ^[1] - 17:11 protective ^[7] - 3:23, 3:25, 4:7, 4:9, 4:19, 5:2, 18:10 provide ^[4] - 8:19, 15:18, 15:22, 18:6 provided ^[2] - 6:12, 6:13 provides ^[1] - 3:2 providing ^[1] - 12:4 provision ^[1] - 8:5 provisions ^[2] - 2:9, 18:10 purely ^[1] - 6:2 purpose ^[1] - 17:13 purposes ^[5] - 11:8, 12:4, 17:20, 17:25, 18:5 pursuant ^[1] - 2:9 put ^[1] - 15:14</p>
<p>M</p>	<p>N</p>	<p>O</p>	<p>P</p>	<p>Q</p>
<p>MACSTRAVIC ^[1] - 1:22 Magistrate ^[1] - 4:11 Magistrate's ^[2] - 4:15, 4:20 management ^[1] - 4:21 marshalling ^[2] - 10:5, 16:5 Master ^[4] - 2:2, 4:10, 4:16, 4:20 MASTER ^[1] - 1:10 materials ^[1] - 15:8</p>	<p>Nassall ^[2] - 6:10, 6:20, 7:2, 7:13, 7:18, 7:23, 8:9, 8:20, 11:10, 11:14, 12:1, 14:5, 14:8, 14:17, 14:23, 15:4, 15:9, 16:2, 17:4, 17:18, 18:1 Nassall's ^[2] - 6:17, 10:16 nature ^[4] - 10:7, 13:8, 13:13, 17:25 NDEA ^[3] - 7:6, 7:8, 14:23 NE ^[1] - 1:17 necessarily ^[1] - 17:1 necessary ^[1] - 15:20 need ^[5] - 10:17, 11:7, 11:15, 15:16, 18:11 needed ^[4] - 12:10, 12:13, 17:22 needs ^[4] - 12:12, 13:19, 13:20 never ^[7] - 3:5, 7:24,</p>	<p>objected ^[1] - 4:24 obligations ^[1] - 12:15 obvious ^[3] - 9:17, 9:25, 10:21 obviously ^[5] - 2:6, 3:9, 4:10, 10:13, 11:17 OF ^[1] - 1:1 officers ^[1] - 15:17 Official ^[1] - 1:23 one ^[9] - 2:6, 4:23, 8:15, 12:5, 14:2, 14:5, 16:10, 17:17, 18:1 ongoing ^[1] - 9:19 opening ^[1] - 16:1 order ^[17] - 2:4, 2:10, 2:11, 2:23, 3:1, 3:23, 3:25, 4:4, 4:7, 4:9, 4:19, 5:2, 12:14, 15:15, 17:10, 18:10 Orleans ^[1] - 1:14 otherwise ^[1] - 13:1 outside ^[2] - 9:9, 13:3</p>	<p>p.m ^[1] - 19:2 P.M ^[2] - 1:9, 2:2 paper ^[1] - 13:23 papers ^[3] - 5:9, 5:16, 6:7 Paragraph ^[2] - 2:10, 3:1 paraphrasing ^[1] -</p>	<p>quality ^[1] - 9:1 questions ^[13] - 6:22, 6:24, 7:4, 7:5, 8:10, 8:13, 8:21, 12:7, 16:13, 17:19, 17:21, 17:22 quote ^[2] - 6:11, 9:11</p>

<p>R</p> <p>Rachel [6] - 5:14, 7:16, 8:11, 12:2, 17:18</p> <p>rather [2] - 4:3, 9:18</p> <p>RE [1] - 1:4</p> <p>re [1] - 5:4</p> <p>re-litigate [1] - 5:4</p> <p>reaction [2] - 17:11, 17:20</p> <p>read [1] - 6:23</p> <p>ready [1] - 2:7</p> <p>really [1] - 11:19</p> <p>realm [1] - 9:9</p> <p>reason [1] - 9:17</p> <p>reasonably [1] - 5:20</p> <p>reasons [1] - 8:15</p> <p>recipient [1] - 9:19</p> <p>reconsider [3] - 2:8, 4:8, 5:7</p> <p>Reconsideration [7] - 3:20, 3:22, 4:14, 5:3, 5:6, 16:21, 18:14</p> <p>reconsideration [3] - 2:19, 3:9, 16:24</p> <p>RECONSIDERATION [1] - 1:5</p> <p>record [2] - 3:8, 19:5</p> <p>recorded [2] - 1:25, 12:11</p> <p>redact [1] - 10:25</p> <p>redacting [1] - 10:23</p> <p>redaction [1] - 8:7</p> <p>reference [2] - 6:6, 15:16</p> <p>referenced [1] - 9:13</p> <p>references [1] - 16:7</p> <p>reflects [1] - 13:10</p> <p>regarding [1] - 8:2</p> <p>regulatory [12] - 6:5, 6:12, 7:2, 7:11, 7:12, 8:22, 9:20, 10:6, 12:9, 12:15, 16:6, 16:8</p> <p>rehash [1] - 5:4</p> <p>relates [1] - 6:15</p> <p>relevance [1] - 11:3</p> <p>remain [1] - 11:22</p> <p>REMOTE [1] - 1:6</p> <p>remotely [1] - 2:1</p> <p>removed [1] - 7:20</p> <p>render [2] - 12:20</p> <p>rendered [2] - 6:1, 13:20</p> <p>rendering [3] - 6:15, 7:10, 7:23</p> <p>replies [1] - 7:13</p> <p>report [1] - 15:11</p> <p>reported [1] - 13:21</p>	<p>Reporter [1] - 1:23</p> <p>reporter [1] - 2:5</p> <p>Reporter/Transcriber [1] - 19:7</p> <p>request [6] - 6:15, 7:1, 8:11, 9:10, 10:9</p> <p>requested [2] - 4:1, 6:1</p> <p>requests [1] - 8:5</p> <p>require [1] - 9:10</p> <p>required [1] - 4:3</p> <p>requires [2] - 2:24, 11:18</p> <p>respect [5] - 10:4, 12:14, 17:7, 17:14, 18:11</p> <p>respond [3] - 3:15, 7:25, 10:17</p> <p>responded [5] - 7:24, 8:16, 8:17, 10:9, 10:16</p> <p>responding [1] - 10:6</p> <p>response [4] - 6:12, 7:11, 9:24, 16:1</p> <p>responses [5] - 6:5, 7:2, 8:22, 16:6, 16:8</p> <p>responsive [1] - 14:2</p> <p>retention [1] - 12:15</p> <p>revelation [1] - 17:14</p> <p>review [7] - 2:18, 4:19, 4:24, 5:13, 15:7, 16:23, 18:14</p> <p>reviewed [1] - 11:17</p> <p>Rice [1] - 17:9</p> <p>RMR [1] - 19:7</p> <p>Road [1] - 1:17</p> <p>Robert [1] - 1:21</p> <p>role [1] - 18:4</p> <p>RPR [1] - 19:7</p> <p>ruling [4] - 4:15, 5:8, 15:18, 16:20</p> <p>rulings [2] - 4:11, 4:20</p> <p>Russia [1] - 8:2</p> <p>S</p> <p>sartans [1] - 7:9</p> <p>satisfy [1] - 16:18</p> <p>Sawyer [1] - 7:19</p> <p>Schneider [3] - 4:3, 4:11, 4:13</p> <p>seam [1] - 7:16</p> <p>securing [1] - 17:25</p> <p>see [6] - 5:9, 6:21, 11:14, 13:5, 18:23, 19:1</p> <p>seeking [3] - 12:7, 16:9, 17:13</p> <p>send [4] - 12:24, 12:25, 13:12</p>	<p>sends [1] - 12:23</p> <p>sent [5] - 5:14, 10:14, 11:2, 13:2, 13:9</p> <p>separate [1] - 14:7</p> <p>separately [1] - 11:11</p> <p>September [4] - 6:21, 8:9, 11:25, 18:2</p> <p>several [1] - 17:19</p> <p>short [1] - 6:23</p> <p>show [1] - 7:2</p> <p>side [1] - 10:3</p> <p>significant [1] - 17:12</p> <p>similar [1] - 13:14</p> <p>simple [1] - 8:25</p> <p>simply [4] - 6:16, 7:13, 8:5, 8:25</p> <p>situation [1] - 17:8</p> <p>slew [1] - 8:1</p> <p>SMITH [1] - 1:21</p> <p>somewhere [1] - 10:20</p> <p>sought [1] - 16:10</p> <p>Special [4] - 2:2, 4:10, 4:16, 4:20</p> <p>SPECIAL [1] - 1:10</p> <p>specific [2] - 8:10, 8:21</p> <p>specifically [2] - 5:21, 9:12</p> <p>sprinkle [1] - 5:19</p> <p>standard [11] - 2:18, 3:10, 3:24, 5:8, 5:10, 5:13, 16:18, 16:23, 17:3, 18:14</p> <p>standpoint [2] - 8:12, 17:6</p> <p>STANOCH [12] - 1:13, 2:14, 2:20, 3:5, 5:15, 8:14, 13:25, 14:7, 14:10, 15:25, 18:17, 18:21</p> <p>Stanoch [9] - 2:12, 2:16, 3:16, 5:12, 8:8, 10:19, 13:24, 14:1, 15:23</p> <p>started [1] - 9:21</p> <p>starting [1] - 2:4</p> <p>state [1] - 3:23</p> <p>statement [1] - 16:4</p> <p>statements [1] - 6:4</p> <p>STATES [1] - 1:1</p> <p>stenography [1] - 1:25</p> <p>step [1] - 4:17</p> <p>stepping [1] - 6:3</p> <p>still [1] - 10:1</p> <p>strategic [1] - 10:4</p> <p>strategy [1] - 8:23</p> <p>stream [1] - 11:11</p> <p>Street [1] - 1:14</p>	<p>Streets [1] - 1:8</p> <p>suggest [1] - 12:2</p> <p>suggests [1] - 8:17</p> <p>Suite [1] - 1:17</p> <p>support [1] - 3:19</p> <p>T</p> <p>team [1] - 18:4</p> <p>tenor [2] - 9:13, 11:20</p> <p>term [1] - 17:9</p> <p>terms [3] - 6:3, 8:12, 17:6</p> <p>test [1] - 7:9</p> <p>Teva [15] - 1:18, 1:18, 3:12, 3:14, 5:16, 8:24, 9:2, 9:24, 10:3, 12:9, 14:14, 14:20, 14:22, 15:11, 18:9</p> <p>Teva's [2] - 6:3, 14:2</p> <p>THE [3] - 1:1, 1:10, 13:24</p> <p>themselves [2] - 11:4, 15:9</p> <p>thereafter [1] - 3:3</p> <p>thinking [1] - 12:19</p> <p>third [2] - 7:5, 14:18</p> <p>third-party [1] - 14:18</p> <p>THOMAS [1] - 1:11</p> <p>Thomas [1] - 2:2</p> <p>thousands [1] - 13:15</p> <p>three [6] - 5:22, 5:24, 6:6, 6:18, 18:7, 18:9</p> <p>throughout [3] - 5:20, 8:23, 13:14</p> <p>titled [1] - 3:19</p> <p>tomorrow [1] - 18:23</p> <p>tone [2] - 9:13, 11:20</p> <p>took [1] - 11:2</p> <p>towards [1] - 8:11</p> <p>transcript [2] - 1:25, 19:4</p> <p>transcription [1] - 1:25</p> <p>TRAURIG [1] - 1:16</p> <p>treated [1] - 4:14</p> <p>trouble [1] - 12:5</p> <p>trying [1] - 15:5</p> <p>type [1] - 15:13</p> <p>U</p> <p>U.S [1] - 1:7</p> <p>under [3] - 2:18, 3:24, 5:18</p> <p>UNITED [1] - 1:1</p> <p>unredacted [1] - 11:12</p> <p>unresolved [1] - 15:20</p> <p>up [1] - 15:14</p> <p>USA [1] - 1:18</p>	<p>V</p> <p>VALSARTAN [1] - 1:4</p> <p>Vanaskie [1] - 2:2</p> <p>VANASKIE [18] - 1:11, 2:3, 2:15, 3:4, 3:11, 3:15, 5:11, 8:8, 9:4, 11:23, 14:1, 14:9, 15:2, 15:23, 16:19, 18:19, 18:23, 18:25</p> <p>various [1] - 16:8</p> <p>verbatim [2] - 11:11, 14:18</p> <p>VIA [1] - 1:6</p> <p>via [1] - 2:1</p> <p>VICTORIA [1] - 1:16</p> <p>VIDEOCONFERENCE [1] - 1:6</p> <p>videoconference [1] - 2:1</p> <p>volunteer [1] - 8:19</p> <p>W</p> <p>warrant [1] - 8:7</p> <p>whatsoever [1] - 7:12</p> <p>WHITELEY [1] - 1:13</p> <p>whole [3] - 4:1, 8:1, 9:16</p> <p>wisdom [1] - 4:25</p> <p>words [2] - 11:18, 13:23</p> <p>world [2] - 8:23, 16:15</p> <p>writes [2] - 6:20, 7:4</p> <p>Y</p> <p>year [2] - 4:13, 11:13</p> <p>Z</p> <p>ZHP [14] - 6:24, 7:14, 8:21, 9:3, 14:3, 14:4, 14:8, 14:18, 14:24, 16:2, 16:11, 16:13, 16:14</p> <p>Zoom [1] - 2:1</p> <p>ZOOM [1] - 1:6</p>
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